

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

WOLDON D.,

Plaintiff,

V.

**COMMISSIONER OF SOCIAL
SECURITY,**

Defendant.

CASE NO. 2:23-CV-777-DWC

**ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL**

Plaintiff filed this action, pursuant to 42 U.S.C. § 405(g), for judicial review of the denial of his applications for Supplemental Security Income benefits (SSI) and Disability Insurance Benefits (DIB). Pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73, and Local Rule MJR 13, the parties have consented to proceed before the undersigned. Dkt. 3. After considering the record, the Court finds no reversible error and **AFFIRMS** the Commissioner's decision to deny benefits.

I. BACKGROUND

Plaintiff filed applications for SSI and DIB on September 26, 2020, and July 15, 2020, respectively. Administrative Record (AR) 17, 223–29, 233–44. He alleged disability beginning

1 December 27, 2017. AR 17. After his applications were denied initially (AR 75–110) and upon
 2 reconsideration (AR 113–34), he filed a written request for a hearing (AR 151–54). On October
 3 11, 2022, an Administrative Law Judge (ALJ) held a hearing at which Plaintiff was represented
 4 and testified telephonically. AR 41–72. On November 16, 2022, the ALJ issued a written
 5 decision finding Plaintiff not disabled. AR 14–40. The Appeals Council declined Plaintiff's
 6 timely request for review, making the ALJ's decision final. AR 1–6.

7 II. STANDARD

8 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
 9 social security benefits if the ALJ's findings are based on legal error or not supported by
 10 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th
 11 Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

12 III. DISCUSSION

13 Plaintiff raises two issues on appeal: (1) whether the ALJ erred in evaluating the medical
 14 opinions of Carl Epp, Ph.D., and M. Clark, MD; and (2) whether the ALJ erred in evaluating
 15 Plaintiff's subjective testimony. *See generally* Dkt. 9. Plaintiff challenges the ALJ's assessment
 16 of his mental, but not physical, impairments and limitations. *See generally id.* Plaintiff's
 17 requested remedy is a remand for further proceedings. *Id.* at 12–13.

18 A. Medical Opinions

19 Under the 2017 regulations applicable to this case, an ALJ does need not defer or assign a
 20 specific weight to particular medical opinions. *See* 20 C.F.R. §§ 404.1520c(a)–(b), 416.920(a)–
 21 (b). Rather, the ALJ must only articulate the persuasiveness of the medical opinions. *Id.*
 22 Generally, the ALJ must only articulate how he considered the “consistency” and
 23 “supportability” of the opinions. 20 C.F.R. §§ 404.1520c(b)(2); 416.920c(b)(2). And this
 24

1 explanation must be supported by substantial evidence. *Woods v. Kijakazi*, 32 F.4th 785, 792
 2 (9th Cir. 2022).

3 1. Carl Epp, PhD

4 State agency medical consultative examiner Dr. Epp submitted an opinion on May 6,
 5 2020, based on a telephone interview with Plaintiff. AR 553–58. He opined Plaintiff had several
 6 marked limitations, including in his abilities to understand, remember, and persist in tasks by
 7 following both short and simple instructions and detailed instructions; perform activities within a
 8 schedule and maintain regular attendance; adapt to changes in a routine work setting; and
 9 complete a normal workday and workweek without interruptions from symptoms. AR 555.

10 The ALJ found Dr. Epp’s opinion unpersuasive. The ALJ noted that “Dr. Epp did not
 11 provide [a] rationale for each of his assessed restrictions.” AR 31. This goes to the supportability
 12 of the opinion, which considers the quality of the “objective medical evidence and supporting
 13 explanations presented by a medical source.” 20 C.F.R. §§ 1520c(c)(1); 416.920c(c)(1). An ALJ
 14 “may permissibly reject check-off reports that do not contain any explanation of the bases of
 15 their conclusions.” *Ford v. Saul*, 950 F.3d 1141, 1155 (9th Cir. 2020).

16 Although Dr. Epp provided a brief narrative summary of some of the medical evidence—
 17 including a discussion of Plaintiff’s childhood, his history of traumatic familial incidents, and
 18 experience with physical injuries—there was no discussion of the specific rationales for the
 19 assessed limitations. *See* AR 553–55. Indeed, it is not clear how the narrative summary pertains
 20 in any way to the opined limitations. *See id.* For instance, while Dr. Epp opined Plaintiff had
 21 limitations in his ability to understand, remember, and persist in tasks, the narrative summary
 22 provides no explanation for why this is so. *See id.* The ALJ thus did not err in rejecting the
 23 opinion. *See Woods*, 32 F.4th at 793 (ALJ did not err in rejecting opinion because it was “wholly
 24 unexplained”).

1 The Court need not assess the other reasons given by the ALJ, as any error committed
 2 with respect to these reasons would be harmless. An error is harmless if it is not prejudicial to the
 3 claimant or is “inconsequential” to the ALJ’s “ultimate nondisability determination.” *Molina v.*
 4 *Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012). Here, because the Court concludes the ALJ
 5 provided a valid reason supported by substantial evidence on which to reject the opinion, any
 6 error with respect to the other reasons given would be inconsequential to the ultimate
 7 determination. *See Molina*, 674 F.3d at 1115.

8 2. M. Clark, MD

9 Consultative examiner Dr. Clark submitted an opinion on September 24, 2021, based on
 10 an examination of Plaintiff. AR 860–65. He opined that Plaintiff would “probably have some
 11 difficulty performing simple and repetitive tasks” and “interacting with coworkers and the
 12 public,” would “probably have some significant difficulty performing work activities on a
 13 consistent basis without special or additional instructions,” and “most certainly [would] have
 14 difficulty maintaining regular attendance and completing a normal workday or workweek
 15 without interruptions from a psychiatric condition.” AR 864–65.

16 The ALJ found Dr. Clark’s opinion unpersuasive because his opined limitations were
 17 inconsistent “with the treatment record.” AR 26–27. This is a valid reason to discount an
 18 opinion. *See Woods*, 32 F.4th at 792–93. Dr. Clark’s opined limitations appeared to be based on
 19 his findings that Plaintiff had difficulties with concentration and focus, his observation that
 20 Plaintiff needed to be reminded of where he was, and his finding of cognitive difficulties. AR
 21 864–65. The treatment notes cited by the ALJ contradict these findings. *See* AR 1094 (attention
 22 and focus within normal limits); 1115 (same); 846 (normal orientation); 1096 (same); 1114–15
 23 (same); 1415 (same). The ALJ’s determination was therefore supported by substantial evidence.
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1 The ALJ also found Dr. Clark's opinion unpersuasive because treatment notes indicated
 2 "improvement in [Plaintiff's] mental symptoms with treatment, which includ[ed] medication and
 3 talk therapy." AR 27. Symptoms that can be adequately controlled by treatment are not
 4 disabling. *Warre v. Comm'r*, 439 F.3d 1001, 1006 (9th Cir. 2006). This finding was supported by
 5 substantial evidence—treatment notes indicated Plaintiff developed skills which reduced his
 6 anger and emotional distress and reduced his impulsivity. AR 1109. This was confirmed by notes
 7 indicating Plaintiff's symptoms improved during this time period. AR 1094, 1116, 1439, 1444.
 8 Plaintiff argues that these notes were in the context of other events which might have caused him
 9 to not display symptoms of emotional distress. Dkt. 9 at 9. This is not true of at least some of the
 10 notes the ALJ relied on (e.g., AR 1109), and the Court "must uphold the ALJ's decision where
 11 the evidence is susceptible to more than one rational interpretation," *Burch v. Barnhart*, 400 F.3d
 12 676, 680–81 (9th Cir. 2005). Because Dr. Clark's opined limitations were based, in part, on
 13 Plaintiff's purported emotional distress interfering with his work (see AR 865), this was an
 14 adequate reason to reject Dr. Clark's opinion.

15 In sum, the ALJ's finding was supported by substantial evidence and the ALJ did not err
 16 in assessing Dr. Clark's opinion.¹

17 **B. Subjective Testimony**

18 Plaintiff argues the ALJ erred by failing to give "specific, clear, and convincing reasons"
 19 for rejecting Plaintiff's testimony about the severity of his mental impairments. Dkt. 9 at 8–13. If
 20 _____

21 ¹ Any error with respect to the opinions of Drs. Clark and Epp may also be rendered harmless because the ALJ
 22 articulated reasons for finding the contrary opinions of state agency psychologists more persuasive. AR 31. The ALJ
 23 relied on the state agency psychologists' greater familiarity with the record (AR 30–31), a valid reason to weigh
 24 some opinions as being more persuasive than others, see 20 C.F.R. §§ 404.1520c(b)(3), (c)(5); 416.920c(b)(3),
 (c)(5); see also *Woods*, 32 F.4th at 791–93 (finding the new regulations eliminate any presumptive weight given to
 the opinions of treating and examining physicians); *Marsh v. Colvin*, 792 F.3d 1170, 1173 (9th Cir. 2015) ("We
 reject the idea that not mentioning a treating source's medical opinion precludes use of harmless error doctrine . . ."). However, the Court need not decide if this is so, given that the ALJ properly found both opinions unpersuasive.

1 a claimant produces objective medical evidence of impairments and shows the impairments
 2 could reasonably be expected to produce some degree of the alleged symptoms and there is no
 3 affirmative evidence of malingering, an ALJ may reject the claimant's symptom testimony only
 4 by providing specific, clear, and convincing reasons. *Carmickle v. Comm'r, Soc. Sec. Admin.*,
 5 533 F.3d 1155, 1160 (9th Cir. 2008); *Benton ex rel. Benton v. Barnhart*, 331 F.3d 1030, 1040–41
 6 (9th Cir. 2003).

7 1. Affirmative Evidence of Malingering

8 Defendant argues there is “affirmative evidence of malingering” with respect to
 9 Plaintiff’s physical impairments which absolves the ALJ of the duty to provide specific, clear,
 10 and convincing reasons for rejecting Plaintiff’s testimony with respect to his mental
 11 impairments. Dkt. 12 at 2–3. Plaintiff does not challenge the ALJ’s assessment of his physical
 12 impairments and related symptoms. *See generally* Dkt. 9.

13 Evidence of malingering is a sufficient basis upon which to reject Plaintiff’s testimony,
 14 *see Benton*, 331 F.3d at 1040–41, and “relieve[s] the ALJ from the burden of providing specific,
 15 clear, and convincing reasons to discount [Plaintiff’s] testimony.” *Baghoomian v. Astrue*, 319 F.
 16 App’x 563, 565 (9th Cir. 2006) (unpublished opinion) (citing *Smolen*, 80 F.3d at 1281). Plaintiff
 17 contends that “[t]he ALJ did not make a finding of malingering.” Dkt. 13 at 4. The ALJ is not
 18 required to make a specific finding of malingering; rather, it is sufficient that there is affirmative
 19 evidence suggesting malingering. *See Carmickle*, 533 F.3d at 1160 n.1.

20 The ALJ cited two pieces of evidence in support of the claim that there was “extensive
 21 evidence of symptom exaggeration,” AR 25–26, and Defendant points to both pieces to support
 22 the claim that there was “affirmative evidence of malingering,” Dkt. 12 at 2–3.

23 First, several treatment notes indicated Plaintiff’s complaints of physical pain were likely
 24 exaggerated. *See* AR 470 (complaints of discomfort “suggest[ed] augmented pain behavior”);

1 AR 543 (“range of motion is under voluntary control); AR 522 (“considerable inconsistency of
 2 biomechanical applications indicat[es] symptom exaggeration”); AR 530 (“effort was often
 3 poor”); AR 869 (pain “appeared exaggerated”). However, notes merely suggesting that Plaintiff
 4 exaggerated his symptoms do not constitute affirmative evidence of malingering. *See Austin v.*
 5 *Saul*, 818 F. App’x 725, 729 (9th Cir. 2020) (unpublished opinion) (“Nor do we equate a
 6 claimant’s possible exaggerations regarding the severity of his symptoms with affirmative
 7 evidence of malingering.”); *Wick v. Barnhart*, 173 F. App’x 597, 598–99 (9th Cir. 2006
 8 (unpublished opinion) (a note of “a high probability of psychiatric symptom exaggeration” does
 9 not constitute affirmative evidence of malingering). While such evidence can form the basis of a
 10 negative credibility determination with respect to Plaintiff’s physical symptoms, *see e.g.*,
 11 *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th Cir. 2002), Plaintiff does not challenge the ALJ’s
 12 determinations with respect to his physical impairments, *see generally* Dkt. 9.

13 Second, the ALJ also cited “objective of 4 of 4 positive Waddell’s sign[s]” to support the
 14 claim that there was evidence of symptom magnification. AR 26 (citing AR 870). But “the
 15 Waddell test does not by itself constitute ‘affirmative evidence’ of malingering.” *Wick*, 173 F.
 16 App’x at 598–99. “The test establishes five ‘signs’ of nonorganic sources of lower back pain and
 17 does not distinguish between malingering and psychological conditions.” *Id.* at 599. Here, the
 18 doctor administering the test interpreted the results as “suggest[ing] . . . that there is an overlay of
 19 patient’s psychiatric illness” rather than supporting a finding of malingering. AR 870. The ALJ
 20 did not address this interpretation or make a contrary finding. *See* AR 25–26. Thus, the
 21 Waddell’s test does not constitute affirmative evidence of malingering in this case.

22 Thus, the ALJ was required to give “specific, clear, and convincing reasons” for rejecting
 23 Plaintiff’s testimony about the extent of his limitations. *See Carmickle*, 533 F.3d at 1160.
 24

1 2. Plaintiff's Testimony

2 a. *Social Difficulties*

3 Plaintiff testified and stated in function reports that he has social difficulties that prohibit
 4 being around others, in part due to his anxiety and depression. AR 50, 59, 305, 310, 314–15, 336.
 5 The RFC limited Plaintiff to “no contact with the public,” “work[ing] in proximity to coworkers
 6 but not in coordination with them,” and “occasional contact with supervisors.” AR 23.

7 The ALJ found Plaintiff’s testimony “[did] not support greater mental limitations than
 8 those accommodated in the [RFC].” AR 28. “It is not the court’s role to ‘second-guess’ an ALJ’s
 9 reasonable interpretation of a claimant’s testimony.” *Smartt v. Kijakazi*, 53 F.4th 489, 500 (9th
 10 Cir. 2022) (citing *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001)). In particular, the ALJ
 11 pointed to Plaintiff’s testimony about his ability to perform past work (AR 28), which itself
 12 serves as an adequate reason to reject Plaintiff’s testimony, *see* 20 C.F.R. § 404.1529(c).

13 Plaintiff testified that it was his physical, not mental, symptoms that precluded him from
 14 performing past work. *See* AR 59. He testified that he was previously able to work as a donut
 15 maker when the work was independent and did not require public contact. *Id.* He left the position
 16 only after getting a supervisory role requiring public contact. *Id.* He testified that he could do his
 17 prior construction job because he did not “have to deal with anybody.” *Id.* Those jobs, he
 18 testified, he was able to do because he “could be by [him]self and work on [his] own.” AR 60.
 19 But he also testified about his tactics for managing conflicts with others at those jobs, suggesting
 20 he was not always working independently. AR 59–60. In his function report, he said he could get
 21 along with authority figures “as long as they [are not] mean or raising their voice[s].” AR 315.

22 Plaintiff’s difficulties with public contact are reflected in the RFC. His testimony
 23 supports an ability to have occasional supervisory contact. His testimony that his physical
 24 inabilities and public contact were the factors preventing returning to his past work, combined

1 with indices that he was still working in proximity to others while doing that past work, support
 2 the conclusion that he was able to work independently but around others, as the RFC reflects.
 3 The ALJ therefore reasonably interpreted claimant's testimony and the Court must not second-
 4 guess that interpretation. *Smarrt*, 53 F.4th at 500. This interpretation renders any error the ALJ
 5 committed in rejecting Plaintiff's testimony harmless.

6 To the extent Plaintiff's testimony was inconsistent with being able to be in proximity to
 7 others, the ALJ did not err in rejecting this testimony by finding it was inconsistent with
 8 Plaintiff's activities of daily living. AR 28. Activities of daily living are a valid reason to
 9 discount Plaintiff's testimony if they are inconsistent with his alleged symptoms. *See Orn v.*
 10 *Astrue*, 495, F.3d 623, 639 (9th Cir. 2007). Plaintiff indicated he was able to shop in stores (AR
 11 336), leaves his home alone (*id.*), talks with neighbors (AR 337), has a neighbor who cooks for
 12 him (AR 340), frequently goes to neighbors' houses "to get something or ask for help" (AR 374),
 13 and regularly assists his neighbors (AR 1135–36). These activities are inconsistent with a
 14 totalizing inability to be in proximity to others.

15 In sum, Plaintiff's testimony about his social difficulties was consistent with the RFC
 16 and, even if it was not, the ALJ presented clear and convincing reasons for discounting it. The
 17 Court need not consider whether the other reasons the ALJ gave for rejecting Plaintiff's
 18 testimony were erroneous, as any error committed with respect to those reasons would be
 19 harmless. *See Carmickle*, 533 F.3d at 1162 (finding the inclusion of erroneous reasons for
 20 rejecting Plaintiff's testimony harmless where other valid reasons supported ALJ's decision).

21 b. *Concentration*

22 Plaintiff also testified and indicated in his function report that he has difficulties
 23 concentrating and is easily sidetracked by distractions. AR 55, 315. The RFC limited Plaintiff to
 24 "understand[ing], remember[ing], and carry[ing] out simple instructions and tasks." AR 23. That

1 limitation can adequately capture some restrictions in concentration abilities. *See Stubbs-*
 2 *Danielson v. Astrue*, 539 F.3d 1169, 1174 (9th Cir. 2008). In particular, simple and unskilled
 3 work typically requires only the ability to maintain attention for 2-hour segments; “concentration
 4 is not critical” for such work. *See* POMS DI 25020.010(B)(3); *Warre v. Comm’r of Soc. Sec.*
 5 *Admin.*, 439 F.3d 1001, 1005 (9th Cir. 2006) (“The POMS does not have the force of law, but it
 6 is persuasive authority.”); *see also Terrey v. Berryhill*, 696 F. App’x 831, 833–34 (9th Cir. 2017)
 7 (ability to maintain attention and concentration for brief periods consistent with RFC limited to
 8 simple and unskilled work); *Shari R. v. Saul*, 2021 WL 1396278 at *5 (E.D. Wash. Apr. 13,
 9 2021).

10 To the extent Plaintiff’s testimony was inconsistent with an ability to maintain sufficient
 11 attention to complete his work, the ALJ stated clear and convincing reasons for rejecting
 12 Plaintiff’s testimony. Plaintiff’s concentration difficulties appear to arise from emotional distress.
 13 *See e.g.*, AR 55. As discussed above, the ALJ found Plaintiff’s emotional distress had improved
 14 from treatment, and this finding was supported by substantial evidence and is an adequate reason
 15 to reject his testimony, *see Warre*, 439 F.3d at 1006. The ALJ also found that Plaintiff’s
 16 testimony was inconsistent with treatment notes showing that he had normal attention, AR 27
 17 (citing AR 1094, 1115, 1321, 1342), which, as discussed, is all that is necessary to maintain a
 18 level of concentration consistent with the RFC. Inconsistency with medical evidence is a valid
 19 reason to discount a Plaintiff’s testimony.

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IV. CONCLUSION

For the foregoing reasons, the Court hereby **AFFIRMS** Defendant's decision denying benefits.

Dated this 5th day of January, 2024.

Dw Christel

**David W. Christel
Chief United States Magistrate Judge**